Intelligence Collection Efforts and the Combatant/Noncombatant Distinction

Permissions and Prohibitions on Information Gathering

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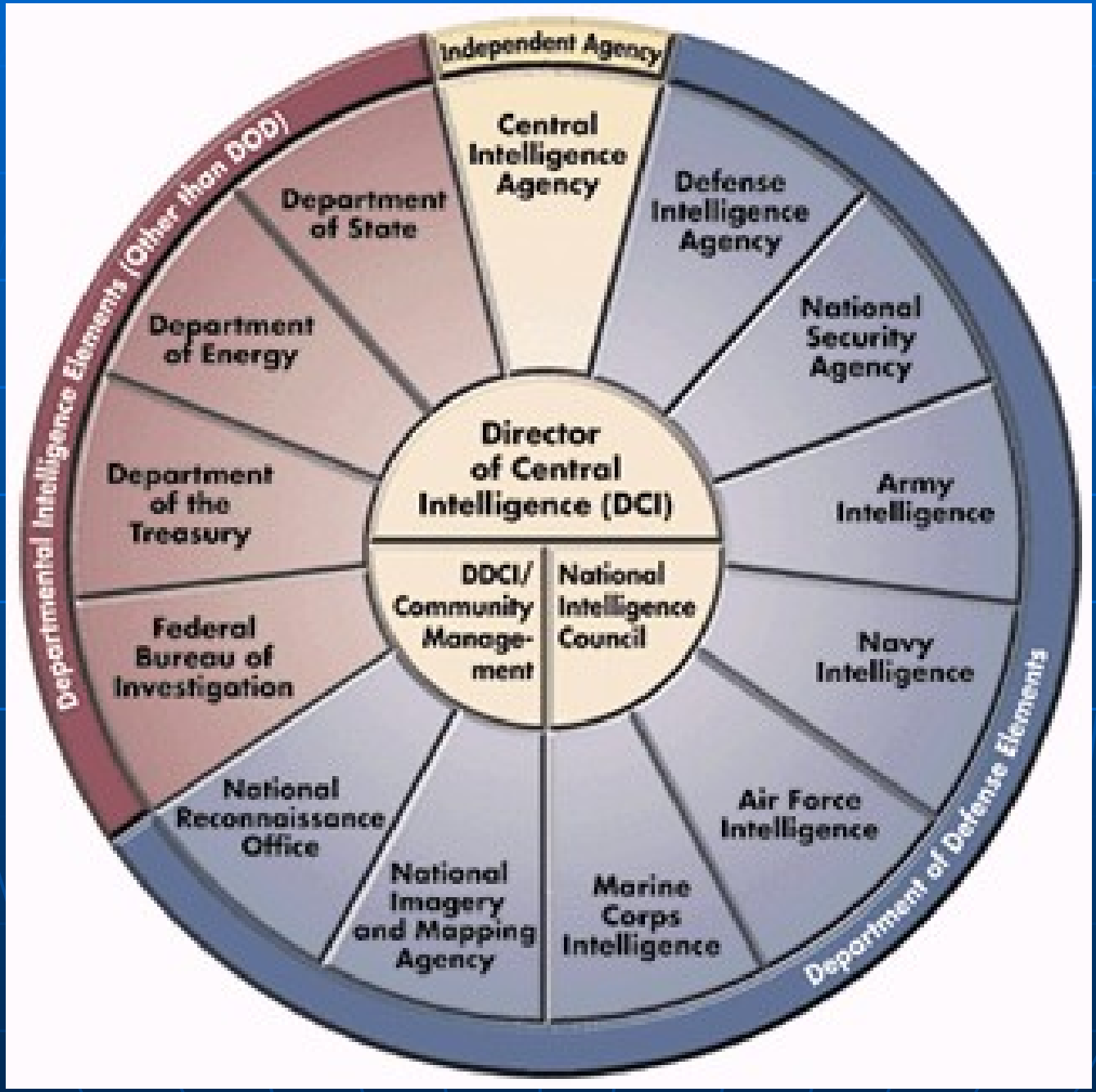
Preview

- Introduction: Ethical issues in intelligence collection
- The Problem: Motivating the discussion
- Setting Limits: Bounding the problem
- Approach: Methodology
- Theories: Approaches to combatancy
- Reconciliation: Loosening the requirement
- Futures: Resolution and suggestions for research


Independent Agency
Central Intelligence Agency
Defense Intelligence Agency
National Security Agency
Army Intelligence
Navy Intelligence
Air Force Intelligence
Marine Corps Intelligence
National Imagery and Mapping Agency
National Reconnaissance Office
Federal Bureau of Investigation
Department of the Treasury
Department of Energy
Department of State
Departmental Intelligence Elements (Other than DOD)
Department of Defense Elements
Director of Central Intelligence (DCI)
DDCI/ Community Manage-ment
National Intelligence Council

Planning and Direction
1
Collection
2
Processing
3
Analysis and Production
4
Dissemination
5

The Problem

- Collection may involve a rights violation
  - Compare open source vs. technical collection
  - Privacy…closely related to private property…possibly a *foundational* right (Locke)
  - Insidious—harm not immediately apparent
- "Worst" case: hard-line deontic view
  - No ordinal ranking of rights (perfect duties)
  - Massive violations of respect for persons occurring daily…intelligence collection as a "universal rights solvent"
- Arguably just as important as moral issues associated with wartime non-intel action
- *Who deserves to be collected against?*

Setting Limits

- Bracket off wartime collection
- Assume relatively non-invasive collection effort
- Assume international collection (avoid domestic surveillance issues)
- Assume away “public space” collection
- Ease consequential upshot (not discovered, no political fallout, etc.)
- Work with the problematic as defined by the hardcore deontologist

Methodology

- “Easy way out”—rush straight to the metaphysical question (e.g., abandon Kant and embrace Mill or even a variant of act utilitarianism)
- Work with the deontologist: press on the issue of rights and duties…resolve the combatant/noncombatant issue *while still working within a rights-based framework*
- If a proper theory of permissions exists within this framework, reasonable people who disagree can reach a practical shared *modus vivendi*

Issues of Dessert

- Who can justifiably be collected against?
- Those who *deserve* it
  - Those engaged in wrong-doing…the guilty
  - Those who consent to be collected against
  - Revolves around a respect-for-persons framework
- Obvious connection: combatant/non-combatant distinction
- Clearest rights-based theory: Jeffrie G. Murphy (“Is Killing the Innocent Absolutely Immoral?”…in ’94 “Killing and Letting Die,” edited by Steibock and Norcross)…compare Richard Brandt

Murphy's Position

- Noncombatant/combatant distinction is a proxy for the innocent/guilty distinction
  - Normally a legal notion given force by a moral intuition…no legal mechanics on the battlefield (but may be in collection)
- The guilty: *those who are part of both the logical <u>and</u> causal chain of agency required to do harm to another*

Murphy (Continued)

- Unpacking causal connection
  - Relatively straightforward notion: actions that contribute to or constitute ability to harm another
  - Taxpayers…farmers…dual-use technologies… uniform manufacturers…pilot training bases… soldiers using weapons
  - “Percentage” of contribution varies—easy cases and hard cases
- Conjunctive requirement: *and logical chain*

Murphy (Continued)

- Logical chain of agency (Kantian colors)
- Certain actions reflect maleficent intention…by necessity (non-contingent connection) these actions involve forming the intention to harm others
- Tests: qua human vs. qua soldier needs
- “Run the counterfactual”
- Heavy lifting…but epistemically inaccessible

Murphy (Continued)

- Reasonability clause
  - “…those whom it is reasonable to believe that…”
- Notoriously slippery, but…
  - External signals
    - Uniforms
    - Armament
    - Belligerent action
    - Context counts…
    - Ideally: intention meter (but tantamount to pacifism)
- All against a background of *due care*
  - Innocent until proven guilty…legal analogy

Cases

Applying the Machinery

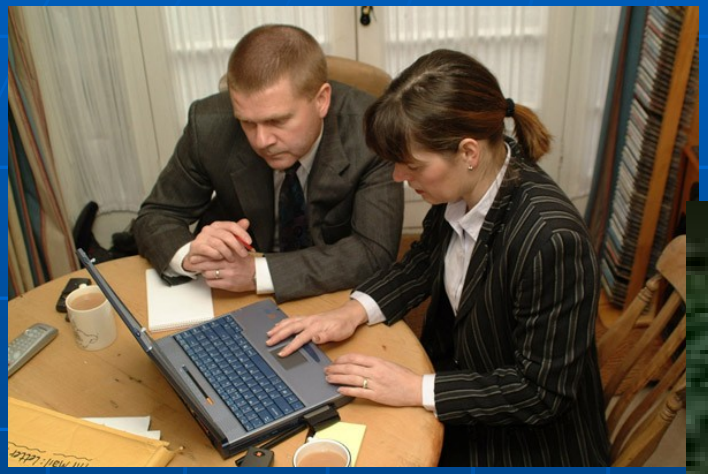
- *Much* more difficult in the case of intelligence collection
- Issues:
  - Ascertaining intention is problematic
  - Post hoc justification is standard practice
  - Exact same physical action (save brain states, which are difficult to observe) driven by wildly different intentions…can happen in traditional combatancy determinations, but not as often
  - Range of actions to which the test applies is vast (context *explodes*)
- Examples…

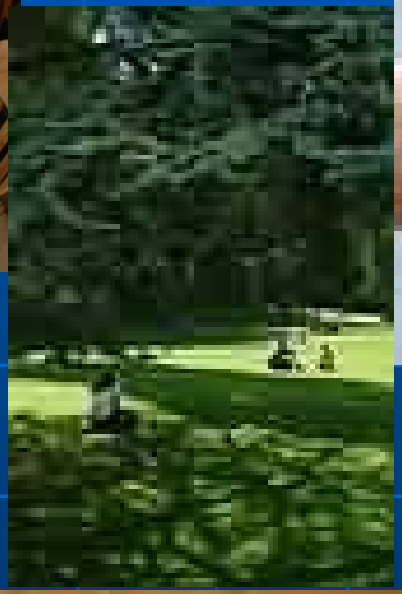
Cases

I love you too, Mom…can’t wait to visit with Dad…by the way, I got fired from work today…

Yes, Vladimir, I procured the crack cocaine as you directed and will launder it with our front man Rhodes in Colorado Springs…

Cases





In the face of the problem…

- Options:
  - Double effect (but does not pass “bad effect cannot be the means to the good effect” prong)
  - Embrace hard-line view…almost all collection is unjustified (reductio…but recall brackets)
  - Rights hierarchy…abandon Kant (W. D. Ross) (not true to assumptions)
  - Argue for implicit consent/game playing (not plausible)
  - Admit that in the case of the non-consequentially injurious rights violations of the kind that occur in most dragnet intel collection, connection to the causal chain is *all* that is required (open the floodgates)
  - Abandon deontic view when stakes are high (Walzer on “Supreme Emergency”)
  - Leverage legal analogy (put in place mechanisms at planning level to check abuse)
- My favorite: *some combination of the last two…*true to much of the hard-line view without sacrificing too many considered moral intuitions

For a review, see Casebeer (2004) “Intelligence Oversight” (in R. Carlisle, ed., Encyclopedia of Intelligence and Counterintelligence, M.E. Sharpe)

Summary

- Intelligence collection presents important moral issues, especially for the rights theorist...
- Collection should generally occur only against those who deserve it, just as in the application of force...
- But the traditional tests are difficult to apply...
- Which means some intelligence collection operations should be conducted only when a legal proceeding has determined sufficient evidence exists to establish reasonable cause...
- Or not, if the heavens really are about to fall!
- Much remains to be done, though.

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